SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 14 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1101

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 17, AFL-CIO,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD
and
GEORGE KOCH SONS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Sheet Metal Workers International Association, Local No. 17, AFL-CIO, (hereinafter referred to as Local 17), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on October 18, 1973 (*infra*, p. 24).

Opinions Below

The Opinion of the Court of Appeals is reported at — F.2d —, and — LRRM —, and is reproduced in Appendix A. The Opinion of the National Labor Relations Board is reported at 199 NLRB No. 26, and at 81 LRRM 1195, and is reproduced in Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on October 18, 1973. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

1. When an employer voluntarily agrees with a union to a collective bargaining contract providing minimum wages and fringe benefits for certain of its supervisory personnel, does the union violate Section 8(b)(1)(B) of the National Labor Relations Act when it attempts to enforce payment of these benefits by engaging in a contractually authorized work stoppage?

2. When an employer voluntarily agrees with a union to a collective bargaining contract providing minimum wages and fringe benefits for certain of its supervisory personnel, does the union violate Section 8(b)(1)(B) of the National Labor Relations Act when it fines a union member for working as a foreman for wages and fringe benefits less than those provided in the collective bargaining contract?

3. When an employee possesses only the authority to submit recommendations and carry out ministerial orders in labor-management disputes, is there substantial evidence that this employee is the employer's representative

for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act?

4. When an employer and a union have contractually agreed to resolve disputes through voluntary arbitration in a manner consistent with the National Labor Relations Act, may the National Labor Relations Board hear and determine the employer's charges of violations of Section 8(b)(1)(B) of the Act if the employer submitted the same charges to a contractual arbitration which resulted in a decision against the employer?

5. If the National Labor Relations Board finds that a union violated Section 8(b)(1)(B) of the National Labor Relations Act by fining a supervisor-member or by engaging in a contractually authorized work stoppage, may the Board order the union to pay the employer amounts which, pursuant to the collective bargaining contract, the employer paid to its employees in lieu of wages for the work missed because of the work stoppage?

Statutes Involved

This case primarily involves the construction of Section 8(b)(1)(B) of the National Labor Relations Act (29 U.S.C. § 158(b)(1)(B), hereinafter referred to as "the Act"):

> "(b) It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce ... (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;..."

The case also involves Section 14(a) of the Act:

> "Sec. 14(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or

remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Statement

This case arose out of efforts of Local 17 to enforce its collective bargaining contract with the Respondent, George Koch and Sons. Koch voluntarily agreed that for work at its Framingham, Massachusetts job site, it would be bound by the terms of Local 17's Area Agreement. (A. 96)[1] As is common in the construction industry, the Area Agreement covered all employees within the sheet metal trade, including foremen. (A. 359, 370)

Among other benefits, the Agreement provided that a normal workday would be eight hours and that each journeyman, including foremen, would receive a certain minimum rate of pay. (A. 360, 368-370) The Agreement further provided that Koch would pay certain amounts for each employee to Sheet Metal Workers' health, welfare and pension funds. (A. 368-370) If the employer was delinquent in these contributions, the Agreement provided that Local 17 could strike to enforce the payment. (A. 369) The Agreement specified a grievance procedure for resolving disputes concerning the meaning or application of the Agreement. (A. 363-364)

Pursuant to the Agreement's "two-man rule,"[2] Koch

[1] "A." refers to the Joint Appendix of the parties before the First Circuit. A copy of the Joint Appendix has been filed with the Clerk of the Supreme Court.

[2] Under the two-man rule, no more than two of the journeymen sheet metal workers on a job site may live outside the geographic area covered by the Area Agreement applicable to the job site. (A. 361-362, 385)

had hired one David Ziltener from Janesville, Wisconsin as an "erection supervisor"[3] for the Framingham job site. During his nine months at the site, Ziltener was little more than a working foreman. He engaged in no collective bargaining for the employer, and at most, he participated in only two labor-management disputes: one jurisdictional dispute and one discharge. In each, Ziltener only submitted recommendations and followed company orders. (A. 281-285, 338-341, 242-244, 133-136)

When Ziltener first arrived at the job site,[4] he reported to Local 17 and informed union officials that he was receiving $600 per week from Koch. (A. 136-137, 5, 211, 269-270) In fact, Koch actually paid Ziltener $285 per week plus $20 per day for living expenses, which is an amount considerably below the $450-500 per week received under the Agreement by the other journeymen on the job site.[5] (A. 5, 259-260) In addition, except for his last three weeks on the site, Koch did not compensate Ziltener for the overtime which he worked. (A. 259-260) Finally, in violation of the Area Agreement and the separate oral agreements with both Ziltener and the union, Koch did not make contributions on Ziltener's behalf to the appropriate health, welfare and pension funds. (A. 261-263)

About July 6, 1970, Koch unilaterally discharged Ziltener for cause. (A. 102) After termination, Ziltener complained for the first time to Local 17 about Koch's violations of the wage and fringe benefit provisions of the Area Agreement. (A. 150, 249-250) Upon learning of these violations, Local 17 demanded, *inter alia,* that Koch make the required contributions on behalf of Ziltener to the appropriate

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[3] This title is relatively unknown in the industry.

[4] About November 17, 1969. (A. 356)

[5] Under the Area Agreement, as a foreman Ziltener should have received at least 25¢ per hour more than the other journeymen on the site. (A. 370)

health, welfare and pension funds.[6] When Koch refused to make these payments, pursuant to the Area Agreement, Local 17 removed the men from the job site on July 31 and August 1, 1970. (A. 177, 369) Pursuant to Addenda No. 12 to the Area Agreement, the union demanded that the striking employees be compensated for the time they lost because of the work stoppage caused by Koch. (A. 369)

The union's sole interest in these work stoppages was the enforcement of its agreement with Koch. At no time did the union attempt to have Ziltener either fired or hired by Koch as a supervisor. Nor did the union in any way attempt to coerce Ziltener in the performance of his supervisory duties.

When Koch agreed to make the required contributions on Ziltener's behalf, the strikers returned to work and were appropriately compensated for the time lost. (A. 90-91) No further work stoppages were called because of any dispute concerning Ziltener.[7]

After the men returned to work, Koch filed a grievance under the contract with the Local Joint Adjustment Board over the work-stoppages and over its liability for health and welfare contributions on behalf of Ziltener. (A. 373, 376) Among other arguments, Koch alleged that as a supervisor Ziltener was not covered by the Area Agreement. (A. 378) This argument, as well as Koch's entire grievance, was rejected by a unanimous vote of the Local Joint Adjustment Board. (A. 385) Pursuant to Article X of the Agreement, Koch appealed this determination, and

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[6] Local 17 also demanded that Ziltener be returned to work in a non-supervisory position. He was retained in this position for about three weeks, during which time he was paid the journeymen rates pursuant to the agreement. (A. 246-248)

[7] There was testimony concerning two subsequent work stoppages. The union denies that these stoppages had anything to do with Ziltener. (A. 181-183, 188-189)

this appeal is now pending before the Appellate Board. (A. 386-388, 39)

On August 17, 1970 (well after Ziltener had left the Framingham job site and the company's employ), internal union charges were brought against Ziltener. (A. 390-91) He was charged with violating sections of Article 17 of the Constitution and Ritual of the Sheet Metal Workers International Association and Affiliated Local Unions, State, District and Provincial Councils. A trial was held on September 24, 1970 and Ziltener was found guilty of three violations of Article 17: working for less than Boston union contract wages in the Boston area; being paid for forty hours while working various hours over forty; and having no health and welfare or pension contributions paid on hours worked. (A. 395) Ziltener was fined $500 for each violation, and the membership of Local 17 ratified the Trial Committee's decision. (A. 393)

On December 4, 1970, Koch filed charges with the National Labor Relations Board alleging, *inter alia*, that Local 17 had violated Section 8(b)(1)(B) of the Act by engaging in the contractually authorized work stoppage. After investigation, the Acting Regional Director dismissed the charges based upon the work stoppage. Even though Koch had not alleged that the internal union fines imposed upon Ziltener constituted a violation of Section 8(b)(1)(B), the Acting Regional Director did issue a complaint based solely upon these fines (A. 398-399)

On appeal, the General Counsel reversed the Acting Regional Director and issued a complaint charging that both the work stoppage and the fines constituted a violation of 8(b)(1)(B). (A. 345-350)

After a hearing in Boston on September 9 and November 30, 1971, the Board's Trial Examiner dismissed the General Counsel's complaint in its entirety. He held that

the fines imposed upon Ziltener were not a violation of Section 8(b)(1)(B) because that Section was not intended "... to protect scabbing or to protect any employer who violates his own agreement." (*infra*, p. 48) The Examiner found "... even less merit, if possible, in the argument ... that the work stoppage violated Section 8(b)(1)(B)." (*infra*, p. 48).

On appeal, a three-member panel of the Board reversed the Trial Examiner and held that both the fines and the work stoppages constituted a violation of Section 8(b)(1)(B). (*infra*, p. 30). The panel found that Ziltener was a representative of the employer for the purposes of bargaining and grievance resolution within the meaning of the section.[8] According to the panel, if an employer is to be free in selecting such representatives, "... then surely the employer is to be free from union coercion in the matter of setting the terms of such representatives' employment." (*infra*, p. 30) The Board ordered the Union to repay to Koch both the payments made to the union health and welfare funds and the payments made to the strikers pursuant to Local 17's contract with Koch. In addition, the Board ordered the union to repay to Ziltener the $1500 fine which had been imposed upon him (*infra*, p. 34).

The Board petitioned the First Circuit for enforcement of its order, with jurisdiction based upon Section 10(e) of the National Labor Relations Act, 29 U.S.C., § 160(e). On October 18, 1973, the First Circuit affirmed the Board "for the reasons stated in [the Board's] decision..." (*infra*, p. 24).

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[8] The Board also found that Ziltener was a "supervisor" within the meaning of Section 2(11) of the Act, 29 U.S.C. s. 152(11). (*infra*, pp. 27-28).

Reasons for Granting the Writ

I. The Union's Conduct Does Not Constitute a Violation of Section 8(b)(1)(B) of the Act.[9]

1. *Conflict With Other Circuits.*

In construing Section 8(b)(1)(B) of the Act to prevent a union from enforcing the minimum wage and fringe benefits provided for foremen in its contract with the employer, the decision of the First Circuit is in conflict with the construction of Section 8(b)(1)(B) by two other circuit courts of appeals.[10]

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[9] This section of the petition discusses the reasons for granting the writ on both Questions 1 and 2 of the Issues Presented. The Board found both the fine of Ziltener and the work stoppage against Koch had the same purpose: securing the implementation of Local 17's contract with Koch. (*infra*, pp. 30-31) Under the Board's and the First Circuit's interpretation of Section 8(b)(1)(B) the crucial question is whether the union could use any pressure—either fines or work stoppages—for this purpose. In considering the reasons for reviewing this interpretation of the Section, it is therefore appropriate to consider Questions 1 and 2 together.

However, the petitioner has stated the fine and the work stoppage as separate questions under the Issues Presented because under some interpretations of Section 8(b)(1)(B) one form of pressure would be permissible while the other would not be. For instance, the Court could hold that the employer's voluntary contractual authorization of the work stoppages precluded an 8(b)(1)(B) charge on that basis. Since the employer *may* not have authorized the union fines of Ziltener, the Court could nevertheless hold that the fines were a violation of Section 8(b)(1)(B).

The petitioner respectfully suggests that Questions 1 and 2 are so intimately related that should the Court grant a writ of certiorari in this case, the writ should include both Questions 1 and 2.

[10] The First Circuit's construction of Section 8(b)(1)(B) of the Act is in accord with the Sixth Circuit's decision in *NLRB* v. *Lithographers (Toledo Blade)*, 437 F.2d 55, 76 LRRM 2422 (1971) and the Seventh Circuit's decision in *NLRB* v. *I.B.E.W. (Wisconsin Electric Power)*, ___ F.2d ___, 83 LRRM 2827 (1973), *pet. for cert. filed sub nom. Electrical Workers, Local 2150* v. *NLRB*, 42 U.S.L.W. 3353 (U.S. Dec. 5, 1973) (No. 877). The Third Circuit has

In *I.B.E.W., Local 134* v. *NLRB (Illinois Bell Telephone)*, ___ F.2d ___, 83 LRRM 2582 (D.C. Cir. *en banc*, 1973), *pets. for cert. filed sub nom. Florida Power and Light Co.* v. *NLRB*, 42 U.S.L.W. 3166 (U.S. Sept. 27, 1973) (No. 556) and *sub nom. Bell Supervisors Protective Association* v. *NLRB*, 42 U.S.L.W. 3165 (U.S. Sept. 26, 1973) (No. 549), the Court of Appeals for the District of Columbia, sitting *en banc*, held that no violation of Section 8(b)(1)(B) occurred when the union fined members of the union who were supervisors for crossing a picket line to perform rank and file work during an economic strike. In reversing the Board, the Court held that "There is no underlying dispute relating to contract interpretation or grievance settlement in these cases, but rather an economic clash between union and employer totally unrelated to the manner in which supervisors perform their collective bargaining or grievance settlement function." *Illinois Bell Telephone, supra*, ___ F.2d at ___, 83 LRRM at 2590.

In *NLRB* v. *Typographical Union (California Newspapers)*, ___ F.2d ___, 83 LRRM 2314 (9th Cir. 1973), the Ninth Circuit similarly rejected the Board's "broad interpretation" of Section 8(b)(1)(B) and held that under the Act a union could fine a member who was a supervisor for crossing a picket line and performing rank and file work during a strike.

As in these two cases, the dispute here was "an economic clash between union and employer" totally unrelated to Ziltener's performance of supervisory functions. In imposing the fine on Ziltener and in calling the work stoppage, Local 17's sole concern was securing the observance by

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also been faced with the question whether Section 8(b)(1)(B) prevents a union from disciplining a supervisor-member for assisting an employer during an economic struggle. In remanding to the Board for further factual findings, the Third Circuit reserved opinion on this question. *Erie Newspaper Guild* v. *NLRB*, ___ F.2d ___, 84 LRRM 2896 (3d Cir. 1973).

Koch (and Ziltener) of the minimum wage and fringe benefits provided for in the contract.

In the *Illinois Bell Telephone* and the *California Newspapers* cases, the union attempted to prevent a supervisor-member from undermining the union's attempt to secure new economic gains for its members. In the present case, the union attempted to prevent the supervisor-member (and the company)[11] from undermining economic gains already won by the union. As this Court has held, there is no difference: the Union has a strong and legitimate interest in maintaining unity in both forms of economic struggle. *Scofield* v. *NLRB*, 394 U.S. 423, 70 LRRM 3105 (1969).

The First Circuit decision in this case cannot stand with the decisions of the Circuit Courts for the District of Columbia and for the Ninth Circuit. This Court should grant the writ of certiorari to resolve this conflict in the circuits.

2. *The Decision of the First Circuit is an Erroneous Construction of Section 8(b)(1)(B).*

In 1947, Congress was concerned that when supervisors were members of unions, they would not give their full loyalty to their employer.[12] To eliminate the potential conflict in loyalties and to ensure that an employer had the right to insist on the undivided loyalty of its supervisors, Congress enacted Sections 2(3) and 14(a) of the Act, 29 U.S.C. §§ 152(3), 164(a).

Under these two sections, no employer could be compelled

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[11] Under the courts' and the Board's interpretation of Section 8(b)(1)(B), the work stoppage against Koch is not a critical distinguishing factor between this case and *Illinois Bell Telephone* and *California Newspapers*. See *supra*, footnote 9.

[12] *See, e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess., pp. 3-5 (1947), I Legis. Hist. 409-411 (1948).

to recognize any union as the representative of its supervisory employees. 29 U.S.C. § 164(a); See also *Typographical Union No. 38* v. *NLRB*, 365 U.S. 705, 47 LRRM 2920 (1961). However, an employer could voluntarily choose to recognize a union as the representative of its supervisory employees and could conclude a binding collective agreement with the union covering these employees. 29 U.S.C. § 164(a); See also *NLRB* v. *News Syndicate Co.*, 279 F.2d 323, 46 LRRM 2295 (2d Cir. 1960), *aff'd* 365 U.S. 695, 47 LRRM 2916 (1961); *NLRB* v. *Retail Clerks International Association (Safeway Company)*, 203 F.2d 165, 31 LRRM 2606 (9th Cir. 1953), *cert. den.* 348 U.S. 839 (1954).

Unlike Sections 2(3) and 14(a), Section 8(b)(1)(B) was enacted for a much narrower purpose. As the Senate Report stated, Section 8(b)(1)(B) was intended to ensure that the union could not "... dictate who shall represent an employer in the settlement of employee grievances, or ... compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances."[13] This narrower purpose is evident from the words of Section 8(b)(1)(B) itself.[14]

In holding that the union in this case may not take action to enforce its contractually agreed upon wage and fringe benefits, the Board and the First Circuit have confused the purposes of Section 14(a) with those of Section

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[13] Senate Rep. No. 105, 80th Cong., 1st Sess., p. 21 (1947), I Legis. Hist. 427. See also remarks of Senator Taft, *Cong. Record*, Senate, April 23, 1947, pp. 3953-4, II Legis. Hist. 1011-12; and remarks of Senator Ellander, *Cong. Record*, Senate, April 28, 1947, p. 4266, II Legis. Hist. 1077.

[14] Indeed, while Sections 2(3) and 14(a) are concerned with "supervisors", Section 8(b)(1)(B) prevents unions from restraining employees in the selection of "representatives for the purposes of collective bargaining or the adjustment of grievances." These are not identical groups. *Erie Newspaper Guild* v. *NLRB*, *supra*.

8(b)(1)(B). In the process, they have departed very far from the original narrow purpose of Section 8(b)(1)(B).[15]

In this case, there is no evidence to suggest that by merely setting the minimum employment terms for supervisors by contract, the union was trying to dictate the *identity* or even the loyalty of Koch's supervisory personnel. Despite the simplicity of the Board's reasoning, which equates setting minimum contractual terms with the selection of supervisors (*infra*, pp. 30-31), enforcing contractual benefits voluntarily agreed to by an employer does not constitute coercion of the employer in the selection of its supervisory personnel. Such enforcement merely requires the employer to pay to *whomever* it selects as a foreman the benefits it agreed to in its contract with the union. Thus, at the most fundamental level of their analysis, the Board and the First Circuit have misconceived the purpose of Section 8(b)(1)(B).

If allowed to stand, the Board's and the First Circuit's misconstruction of Section 8(b)(1)(B) will have important repercussions upon an employer's option under Section 14(a) of the Act to have its supervisory employees represented by a union. As the District of Columbia Circuit pointed out, employers can secure important financial benefits by agreeing to include supervisors in contracts with the union. Supervisors promoted from the rank and file can maintain their union membership and can continue accruing union health and pension benefits. The employer need not replace these benefits. Moreover, employees can more readily accept promotions to supervisory status without fear of losing their ability to return to rank and file

[15] The Board's and the First Circuit's misconstruction of Section 8b(b)(1)(B) is evident from the face of their opinions. Despite the fact that the section is now over twenty-five years old, neither the Board nor the First Circuit cite a single precedent for their startling construction. Nor does the Board or the First Circuit cite any legislative history to support their construction of Section (b)(1)(B).

work. *Illinois Bell Telephone, supra,* ___ F.2d at ___, LRRM at 2601. See also William B. Gould, "Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers," 1970 *Duke L. J.* 1067, 1129.

Under the Board's and the First Circuit's interpretation of Section 8(b)(1)(B), however, an employer, such as Koch, can at any time safely repudiate the contractual wage and fringe benefit provisions which apply to supervisors. When the contracts covering foremen are virtually worthless, few unions will allow the employer the option of including supervisors in the bargaining unit.[16]

This result was never intended by Congress. The Board and the First Circuit purport to be guaranteeing to Koch the right to be entirely "free from union coercion in the matter of setting the terms of ... [his supervisors'] employment." (*infra,* p. 30) But Koch already has this right, not under Section 8(b)(1)(B), but under Section 14(a). Koch could have insisted on excluding foremen from the agreement it signed with the Union.

In guaranteeing to employers the option to include supervisors within collective agreements, Congress knew that the purpose of such collective agreements would be to set the terms and conditions of supervisors' employment. *J. I. Case* v. *NLRB,* 321 U.S. 332, 14 LRRM 501 (1944). Congress could not have intended that the narrowly drawn words of Section 8(b)(1)(B) gave employers the right to repudiate their contracts at any time.[16A]

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[16] Similarly, where supervisor members are free to engage in strike-breaking or to work below union scales, few unions will allow supervisors to maintain their union membership.

[16A] In fact, the 1947 Congress wanted to preserve the stability of long-established relationships covering foremen in some industries. See "The Role of Supervisors in Employee Unions", 40 U. Chic. L. Rev. 185 (1972).

Section 8(b)(1)(B) should not be construed to "protect Koch from the consequences of its own bad faith." (Trial Examiner's opinion, *infra*, p. 48) While "supervisors are immune from union discipline when acting in mangerial capacities, there is no national labor policy which forbids fines . . . levied . . . when supervisors are not acting in their roles as employer representatives for the 'purpose of collective bargaining or the adjustment of employee grievances'." Note, "Labor-Law – National Labor Relations Act—Section 8(b)(1)(B)—Union Discipline of Supervisory Employees for Strikebreaking Activities," 14 B.C. Ind. and Comm. L. Rev., 785, 799-800 (April 1973). Since the work stoppages and the union fines were not related to Ziltener's performance of supervisory duties, the Court should grant the writ of certiorari to correct the erroneous construction of Section 8(b)(1)(B) by the First Circuit and the National Labor Relations Board.

3. *This Court Should Settle the Construction of Section 8 (b)(1)(B) of the Act.*

Until five years ago, the Board found violations of Section 8(b)(1)(B) of the Act only where the union directly attempted to dictate whom the employer should select as its representative for collective bargaining or grievance resolution.[17] However, beginning in 1968 the Board has found violations of 8(b)(1)(B) where the union's actions had indirect effects upon the employer's choice of representatives.

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[17] See, e.g., *United Slate, Tile, etc., Workers Assoc., Local 36 (Roofing Contractors Assoc. of Southern California)*, 172 NLRB No. 249, 69 LRRM 1300 (1968); *Local 986, Teamsters Union (Tak-Trak, Inc.)* 145 NLRB 1511, 55 LRRM 1205 (1964). For other citations of these early cases see *Illinois Bell Telephone, supra*, ___ F.2d at ___, 83 LRRM at 2587-2588.

In the *Oakland Mailers* case,[18] the Board held that a union could not discipline a supervisor-member because of the way he interpreted the contract in making work assignments since this would "change [the company's] representatives from persons representing the viewpoint of management to persons responsive or subservient to the [union's] will."[19] In a series of cases, the Board expanded this rationale to proscribe any internal discipline where the union was seeking "to enforce its viewpoint as to the meaning of the contract."[20]

In 1972, the Board further expanded its interpretation of Section 8(b)(1)(B) by holding that a union could not discipline a supervisor-member for obeying company orders to institute new work procedures.[21] Similarly, in a number of cases, the Board held that under Section 8(b)(1)(B) a union could not discipline supervisor-members for strike-breaking.[22]

The instant case represents the furthest extension of the Board's new interpretation of Section 8(b)(1)(B). Without precedent and without any authority from legislative history, the Board has held that Section 8(b)(1)(B) requires that an employer be entirely free from "union coercion" in setting the terms and conditions of employment for its supervisory employees. (*infra*, p. 30)

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[18] *San Francisco-Oakland Mailers Union, No. 18*, 172 NLRB No. 252, 69 LRRM 1157 (1968).

[19] *Id.*, 172 NLRB at ___, 69 LRRM at 1158.

[20] *Sheet Metal Workers Int. Assn., Local Union 49 (General Metal Products, Inc.)*, 178 NLRB 139, 142, 72 LRRM 1070 (1969), *enforced*, 420 F.2d 1348, 75 LRRM 2026 (10th Cir. 1970); For a complete discussion of this series of cases, see *Illinois Bell Telephone, supra*, ___ F2d at ___, 83 LRRM at 2588-2589.

[21] *Meat Cutters Union Local 81*, 185 NLRB No. 130, 75 LRRM 1247 (1970), *enforced*, 458 F.2d 794, 79 LRRM 2309 (D.C. Circ. 1972).

[22] See, *Illinois Bell Telephone, supra, California Newspapers, supra*, and see Note 5, *supra*.

The Supreme Court has not yet considered the Board's new construction of Section 8(b)(1)(B). Petitions for certiorari have been filed in two cases involving union discipline of supervisor-members who had engaged in strike-breaking.[23] While these petitions present important questions, this case presents to the Court the best opportunity for settling the construction of Section 8(b)(1)(B).

Strike-breaking is a relatively discrete activity where the union concern is particularly high.[24] Any decision by this Court on cases involving strike breaking can be limited to its facts.[25] Moreover, while awaiting a definitive decision on the strike-breaking issue, unions can easily determine whether the law in their circuit allows or disallows the fining of supervisor-members who engage in strike-breaking.

In contrast, the decision in the *Koch* case casts an entire area of the law into confusion. If employers must be absolutely free to set the terms and conditions of supervisors' employment, unions (and employers) cannot know

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[23] *Illinois Bell Telephone*, *supra*, *pets. for cert. filed sub nom. Florida Power and Light Co.* v. *NLRB*, 42 U.S.L.W. 3166 (U.S. Sept. 27, 1973) (No. 556) and *sub nom. Bell Supervisors Protective Association* v. *NLRB*, 42 U.S.L.W. 3165 (U.S. Sept. 26, 1973) (No. 549) and *Wisconsin Electric Power*, *supra*, *pet. for cert. filed sub nom. Electrical Workers, Local 2150* v. *NLRB*, 42 U.S.L.W. 3353 (U.S. Dec. 5, 1973) (No. 877).

[24] *cf. NLRB* v. *Allis Chalmers*, 388 U.S. 175, 65 LRRM 2449 (1967).

[25] See, e.g., the suggestion that courts should adopt the Board's broad construction of Section 8(b)(1)(B) but should create an exception to allow unions to discipline supervisor-members who engage in strikebreaking. "Restraint or Coercion of Employer — Union Fines Imposed On Supervisor-Members Constitute a Section 8(b)(1)(B) Unfair Labor Practice, 51 Texas L.R. 595, 600-601 (March 1973). Also the Court could decide *Illinois Bell Telephone*, *supra*, and *Wisconsin Electric Power*, *supra*, on the narrow grounds that performing rank and file work during a strike was a supervisory function. This would not settle the construction of Section 8(b)(1)(B) beyond the narrow facts of those 2 cases.

which parts of contracts covering supervisory personnel can be enforced. Unions will not know when, if ever, they can fine supervisor-members, engage in contractually authorized work stoppages or even file legal actions without running afoul of Section 8(b)(1)(B). With this uncertainty about the enforceability of contracts covering supervisors, unions and employers will not know whether they should enter into such contracts and whether Section 14(a) of the Act has any validity.

The confusion over the enforceability of contracts covering supervisory personnel cannot be resolved by a decision of this Court on the other cases where petitions for certiorari have been filed. The instant case presents to the Court the question of the enforceability of such contracts. Moreover, this case presents to the Court the entire question of the effect of Section 8(b)(1)(B) on the relations of the parties during the existence of a collective agreement. As a review of the recent Board decisions suggests, the Board's new interpretation of Section 8(b)(1)(B) will be most important not in the extraordinary situation of a strike, but rather in the day-to-day administration of collective agreements.

This case presents to the Court the best opportunity for reviewing the Board's new construction of Section 8(b)(1)(B). This new construction has caused dissent within the Circuits[26] and within the Board.[27] Commenta-

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[26] See *supra*, footnote 5 and *supra*, pp. 9-11. See also Kiley, J., dissenting in *Wisconsin Electric Power*, *supra*.

[27] See, e.g., Member Fanning's dissent in *I.B.E.W.* v. *Local 134 (Illinois Bell Telephone)*, 192 NLRB No. 17, 77 LRRM 1610 (1971), *pet. for enforcement denied*, *supra*. The extent of the dissent within the Board is also apparent in this case. While the Trial Examiner dismissed the Section 8(b)(1)(B) complaint almost contemptuously (*infra*, pp. 48-49), a three-member panel of the Board unanimously found a violation of Section 8(b)(1)(B) (*infra*, p. 33).

tors have suggested alternative standards for interpreting Section 8(b)(1)(B).[28] The Court should grant the writ of certiorari in this case in order to settle the construction of Section 8(b)(1)(B).

II. Ziltener Was Not a Representative of the Employer For the Purposes of Collective Bargaining or the Adjustment of Grievances.

While expanding the type of conduct it proscribes under Section 8(b)(1)(B), the Board has also expanded the personnel included as representatives of the employer within that section. Under current Board practice, any supervisor is almost *ipso facto* a representative of the employer for the purposes of collective bargaining or the adjustment of grievances. See *Erie Newspaper Guild* v. *NLRB, supra,* and cases cited therein.

In the instant case, the Board found that Ziltener was both a supervisor and a representative of the employer for the purposes of collective bargaining and the resolution of grievances. (*infra,* pp. 26-28) Since there was no contention that Ziltener was Koch's collective bargaining representative, the Board's finding must rest on Ziltener's alleged ability to resolve grievances. However, as a review of the record will indicate, during the nine months which Ziltener was employed at the job site, he, at most, submitted recommendations on the discharge of one employee and followed company directions in the resolution of one jurisdictional dispute. (A. 281-285, 338-341, 242-244, 133-136)[29]

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[28] Note, "Unfair Labor Practice—Union Discipline of Supervisors Who Are Union Members for Performing Rank-and-File Struck Work Is Not An Unfair Labor Practice," 87 *Harv. L. Rev.* 458 (Dec. 1973). For an argument that there are no standards to govern the Board's approach to Section 8(b)(1)(B), see 51 *Texas L. Rev., supra,* Note 25.

[29] If George Thompson, the company's General Supervisor at the job site, had not been out of town, Ziltener probably would have had no role in the resolution of the jurisdictional dispute.

Whatever other supervisory authority Ziltener may have had—and he had very little—the Board and the First Circuit were clearly wrong in finding that he was the employer's representative for the purpose of resolving grievances.

This Court should define what employees are included within the terms of Section 8(b)(1)(B). Particularly with the Board's expansive new approach to the conduct allegedly proscribed under Section 8(b)(1)(B), it is imperative that unions and employers know which employees are covered by that section.[30] Since the Board claims that Ziltener is covered by Section 8(b)(1)(B), this case presents an excellent opportunity for the Court to define the coverage of that section.

III. The National Labor Relations Board Should Have Deferred to the Arbitration Proceedings Agreed To by the Employer.

In Section 203(d) of the Labor Management Relations Act, Congress expressed a strong Federal policy in favor of voluntary arbitration as a method of resolving disputes between unions and employers. 29 U.S.C. § 173(d); See also *United Steelworkers* v. *Enterprise Car and Wheel*, 363 U.S. 593, 46 LRRM 2423 (1960).

In the Area Agreement it had with Local 17, Koch agreed that all disputes would be resolved by the Local Joint Adjustment Board.[31] Pursuant to this Agreement, Koch in fact submitted a grievance to that Board, complaining that Ziltener was a supervisor and that the union

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[30] If Section 8(b)(1)(B) is held to prevent the enforcement of collective contracts covering wages, hours and fringe benefits—as the Board has held in this case—it is *vital* for unions and employers to know which employees are covered within Section 8(b)(1)(B).

[31] The Local Joint Adjustment Board is composed of equal numbers of representatives of management and labor.

demands for health and welfare payments and the work stoppages were in violation of the Area Agreement. When the Local Board unanimously denied this grievance, Koch appealed pursuant to the Area Agreement. (A. 373-390)

As the National Labor Relations Board has held, "[I]t would not comport with the sound exercise of administrative discretion to permit the union to seek redress under the Act after having initiated arbitration proceedings which . . . resulted in a determination upon the merits." *Timken Roller Bearing Company,* 70 NLRB 500, 501, 18 LRRM 1370, 1371 (1946). See also *Dubo Manufacturing Co.,* 142 NLRB 431, 53 LRRM 1070, and *Collyer Insulated Wire,* 192 NLRB No. 150, 77 LRRM 1931 (1971).

As the Board itself found, both the work stoppages and the fines imposed upon Ziltener were for the same purpose: enforcing the union's contractual claim to wages and fringe benefits. (*infra,* p. 30) In determining this contractual issue, the Local Joint Board of necessity had to decide whether Ziltener was a supervisor.[32] Similarly, in determining whether the union's contractual claim was valid, the Local Board of necessity had to consider whether the union's actions were for the purpose of intimidating or coercing Ziltener in the performance of his supervisory duties.[33] The Local Board could have determined both the issue of the work stoppages and the issue of the fines. The National Labor Relations Board should have deferred to this tribunal. *Houston Mailers Union No. 36,* 199 NLRB No. 69, 81 LRRM 1310 (1972), *Baltimore Typographical Union,* 201 NLRB No. 5, 82 LRRM 1127 (1973).[34]

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[32] Koch in fact argued before the Local Joint Board that Ziltener was a supervisor. (A. 378).

[33] Under the Area Agreement, the only purpose for which a work stoppage may be called during the agreement is the collection of delinquent payments to the health and welfare funds. (A. 364, 369)

[34] It is of no consequence that the Area Agreement had no language specifically prohibiting the union from fining a supervisor for the

In recent years, the Board's policy on deferring to arbitration has received a great amount of comment.[35] If the deferral policy is to further the purposes of the Act, the courts must review the Board's exercise of discretion.

Since the Board and the First Circuit gave Koch the opportunity for a second hearing after it had lost the arbitration, the Court should grant the writ of certiorari to correct this abuse of discretion.

IV. Even if the Board Correctly Decided That the Work Stoppages and the Fine Constituted a Violation of Section 8(b)(1)(B), the Board Cannot Order the Union To Reimburse the Employer For Moneys It Paid to the Striking Employees in Lieu of Wages.

Under the Area Agreement, when Local No. 17 is forced to collect health and welfare payments from a delinquent employer by means of a work stoppage, the employees are not to be penalized because of the employer's delinquency. The employer must pay the employees for the time they are idled because of the work stoppage. (A. 369) Accordingly, Koch paid $13,119.92 to *employees* who were idled by the work stoppages on July 31 and August 1, 1970.

The National Labor Relations Board has now ordered the union to pay this $13,119.92 to Koch. If this Court held that only the fine of Ziltener violated Section 8(b)(1)(B), then the remedy is clearly inappropirate because the payments to the employees did not result from the union's violation of the Act.

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performance of supervisory duties. Such a provision is easily implied, and, in any case, the Board's deferral policy should not depend on whether the parties have incorporated the language of the statute into their Agreements. If it did, parties could merely write all of Sections 7 and 8 into their contracts.

[35] E.g., Note, "Deference of Jurisdiction by the National Labor Relations Board and the Arbitration Clause," 25 *Vand. L. Rev.* 1057 (1972).

Even if both the work stoppage and the fines are violations of Section 8(b)(1)(B), the remedy is still inappropriate. As the Trial Examiner found, Local 17 was not enriched by the $13,119.92 and "... if compelled to reimburse, would undoubtedly impose assessments on the strikers." (Trial Examiner's Opinion, *infra*, p. 48 n. 9). In effect, the Board's order requires the union and the General Counsel to function as "a collection agency on behalf of an employer against employees." (Trial Examiner's Opinion, *infra*, p. 48 n. 9)

Requiring the union to fulfill this role would not be conducive of stable and harmonious industrial relations, either in this case or in other future cases.[36] The Court should grant the writ of certiorari to consider whether the Board should embark upon such a hazardous course in the granting of remedies.

Conclusion

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[36] cf. *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 245-249. 50 LRRM 2433, 2436-2438 (1962).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 73-1025.

NATIONAL LABOR RELATIONS BOARD ET AL.,
PETITIONERS,
v.
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 17, AFL-CIO,
RESPONDENT.

Before COFFIN, *Chief Judge,*
McENTEE, *Circuit Judge,* and
KILKENNY, *Senior Circuit Judge.**

DECREE

Entered October 18, 1973

This cause came on to be heard on application for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Board of September 20, 1972, as amended January 10, 1973, is hereby affirmed and enforced in full for the reasons stated in its decision, *NLRB, Petitioner, and George Koch Sons, Inc.* v. *Sheet Metal Workers Int'l Assn., Local Union No. 17, AFL-CIO,* 81 LRRM 1195, 199 NLRB No. 26 [September 20, 1972].

By the Court:
(s) DANA H. GALLUP
Clerk.

A True Copy
ATTEST:
(s) DANA H. GALLUP
Clerk.

* The Honorable John F. Kilkenny, Senior Circuit Judge, United States Court of Appeals, Ninth Circuit, sitting by designation.

APPENDIX B

199 NLRB No. 26 D—6697
Framingham, Mass.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 1—CB—1719

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
LOCAL UNION NO. 17, AFL-CIO
and
GEORGE KOCH SONS, INC.

DECISION AND ORDER

On February 8, 1972, Trial Examiner John F. Funke issued the attached Decision in this proceeding, recommending that the complaint be dismissed. Thereafter, the General Counsel and the Charging Party, George Koch Sons, Inc., filed exceptions and supporting briefs, and the Respondent filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm only the Trial Examiner's rulings, findings, and conclusions as are consistent herewith.

The complaint alleged that the Respondent Union violated Section 8(b)(1)(B) of the Act by charging and fining David Ziltener, a former "erection supervisor" of the Employer, Koch, for certain alleged violations of the Union's rules[1] and alleged violations of the collective-

[1] Specifically, the union rules violated were: (a) working for less than Boston wages in the Boston area; (b) being paid for only 40 hours when working over 40 hours; and (c) having no health and welfare or pension contributions paid on hours worked.

bargaining contract applicable to Koch. The complaint also alleged that by striking to compel Koch to pay Ziltener for back pay and overtime and to make payments to the health and welfare and pension fund, the Respondent Union restrained and coerced Koch in the selection of its representatives for purposes of collective bargaining or the adjustment of grievances in violation of the Act.

The Trial Examiner, in dismissing the complaint in its entirety, found it unnecessary to determine whether Ziltener was a supervisor within the meaning of the Act, since no disciplinary action was taken against him until after he was discharged. Distinguishing this case from others where the Board has found violations, the Trial Examiner stated that: (1) Ziltener was not a supervisor nor even an employee at the time he was fined and (2) Ziltener was not charged with any violation which related to his supervisory duties or responsibilities, but was fined for violation of Local 17 rules. In finding that the work stoppages did not coerce Koch, the Trial Examiner concluded the stoppages occurred to protest Koch's failure to abide by the terms of the contract and to redress Ziltener for the losses sustained because of that breach. For the reasons stated below, we disagree with these conclusions of the Trial Examiner.

Koch, an Indiana employer, was working under contract with General Motors at the GM plant in Framingham, Massachusetts. Koch operated at the Framingham location under the Local 17 area agreement. Throughout the job, Koch had under its supervision up to 150 employees, 87-90 of whom were sheetmetal workers.

In November 1969, Koch wrote David Ziltener, a member of Sheet Metal Workers Local 416 at Janesville, Wisconsin, who had previously worked as a foreman for Koch, employing Ziltener as an "erection supervisor" for the GM job. Ziltener had negotiated his own salary and had already

agreed to terms of employment which were set out in the letter as a weekly salary of $285, living expenses of $20 per day, and other terms. Ziltener reported to the Framingham jobsite November 17, without any tools of the trade, talked to George Thompson, the general superintendent at the site, who told him he was an "erection superintendent" and to "walk the job" as a "coordinator." Thompson considered Ziltener "second in command," and introduced him around as such. Ziltener attended private management meetings to discuss work and manning of personnel, was left in charge during Thompson's absences, handled grievances and work problems, made job assignments, recommended the discharge of at least one employee, disciplined employees, granted time off, and acted as Koch's representative. In Thompson's absence, Ziltener was given full responsibility for the operation of the job.

While Respondent introduced testimony at the hearing for the purpose of demonstrating a lack of supervisory authority in Ziltener, we are left unpersuaded by this testimony. Two union witnesses (Sprague and McLaughlin) admitted that Ziltener attended supervisory meetings; union witness Dowd indicated in his testimony that Ziltener "may have" discussed Robinson's discharge; union witness Sprague admitted that he had observed Ziltener giving orders. Most of the union testimony was limited to establishing that the witnesses had not themselves observed Ziltener performing supervisory functions but, since their observations of Ziltener were limited to only a short time on any given day, their testimony has limited probative value.

Thus even without resolving credibility questions, which is normally a function of the Trial Examiner, we are satisfied that the evidence, considered as a whole, establishes the supervisory status of Ziltener, and we so find.[2] We also

[2] The Trial Examiner made no findings on this matter.

find that this record supports a finding that he was the Employer's representative "for the purpose of collective bargaining or the adjustment of grievances" within the meaning of Section 8(b)(1)(B).

Ziltener was discharged by Koch on July 6, 1971. He then went to Local 17 officials and complained that Koch had not made health and welfare payments and pension contributions to Ziltener's home local as Ziltener claimed Koch had orally promised to do, and it was at that same time local 17 became aware that Ziltener was working for less than the contract wage scale for foremen.[3] Local 17 agents conferred with Thompson regarding Ziltener's wage rates, health and welfare payments, and pension contributions, but Thompson told them it was out of his hands since Ziltener was paid out of the Evansville office. For the 3 weeks following his discharge, Ziltener remained on Koch's payroll as a journeyman because of Local 17's intervention, but was not permitted to work over 40 hours per week.

On July 30, 1970, Koch's vice president, Dishman, out of Evansville, was in Framingham and was told by Local 17 that, if the matter of payments due Ziltener was not straightened out, Local 17 would "pull the men." The sheetmetal workers did not work on July 31 or August 1, 1970. Koch's representatives then went to the union hall and made payment by check, in amounts computed by Local 17, for health and welfare and for the pension fund, as well as back wages (including overtime) to Ziltener. In addition, Koch issued payment to the other sheetmetal workers for the time they lost while on strike. Later, when Local 17 refused to issue general releases (that Koch had

[3] Under the contract, journeymen started at $7.33 an hour. Foremen received about $8.50 an hour. The work week consisted of 40 hours, with overtime at double hourly wages. Usually overtime amounted to about 13 hours per week.

made the payments under duress), Koch stopped payment of the checks to Ziltener. Thereafter, on November 2 to 9 and on December 4, Local 17 again "pulled" the men after threatening to do so if the payments to Ziltener were not made good.

In the meantime, on August 17, Local 17 advised Ziltener that charges had been preferred against him for: (1) working for less than the Boston area wage; (2) being paid for 40 hours while working over 40 hours; (3) having no health and welfare or pension paid on hours worked; and (4) contracting to do business on a basis other than that provided in the contract. Ziltener was notified of his trial, did not appear, and was subsequently notified that he had been fined $500 on each of the first three charges. Ziltener paid the $1,500 fine.

When the sheetmetal workers did not appear for work on December 4, 1970, Koch filed the instant charge and also submitted to the Local Joint Adjustment Board its grievance against Local 17 for striking in violation of the no-strike clause. Koch claimed in its grievance that Local 17 struck to force the health and welfare and pension payments of Ziltener who was a supervisor of Koch and not covered by the contract. In response to Koch's grievance, Local 17 filed a grievance charging Koch with violation of the contract. On January 1, 1971, the Local Board ruled unanimously that Ziltener came into Local 17's area under the "2-man rule" as a sheetmetal worker and that he was entitled to sheetmetal workers' wages in their entirety for all hours worked. Koch appealed the Local Board determination. A panel was appointed and a hearing set for May 20, 1971, but there has been no decision on the appeal.

First, as noted above, we have found that Ziltener was a supervisor. The fact that Ziltener had been terminated as a supervisor at the time he was fined by the Union is not, contrary to the Trial Examiner's Decision, dispositive

of the issue before us. There is no question but that the fine was imposed because of events occurring during the time of his supervisory employment. It related directly, in fact, to the very process of supervisory selection by Respondent. If an employer is to be free from union coercion in the selection of persons who are to serve the employer as its representatives, then surely the employer must be free from union coercion in the matter of setting the terms of such representatives' employment. Thus to fine one who agrees to serve as an employer's representative solely because he and the employer agreed on terms and conditions of employment which the union may find objectionable must necessarily have an inhibiting effect —and indeed a coercive effect—on the employer in his future selection of representatives. And this is true no matter at what point in time the fine itself may have been imposed. The message to the employer will be clear for the future—don't select a supervisor unless the union approves of the terms and conditions of his employment.

As the above comments suggest, we are also unwilling to accept the Trial Examiner's conclusion that Ziltener was not charged with any violation relating to his supervisory status but was fined solely for violation of Local 17 rules. Those rules, as applied by the Union here, would permit the union to dictate the terms and conditions under which an employer could select and engage its management representatives. That seems to us such a clear interference with the freedom of the employer to select his representative as to constitute an open and obvious violation of Section 8(b)(1)(B). We think it equally clear that the work stoppages which were initiated by Respondent were for the purpose of requiring Koch to accede to the union-dictated terms and conditions of Ziltener's employment and thus coerced the Employer in the same manner as the fines levied on Ziltener himself, and we find such conduct

on the part of the Union also to be violative of Section 8(b)(1)(B).

We turn next to Respondent's contention that, pursuant to the doctrine established by the Board in the case of *Collver Insulated Wire,* 192 NLRB No. 150, we should defer decision in this matter until the pending arbitration proceedings are completed (referring to the processing of the grievance initiated by the Employer alleging that the work stoppage was in violation of article X of the governing collective-bargaining agreement). In this connection we note first that the contention has little merit insofar as it is directed to the issue of the fining of Ziltener, since the propriety of the union fine would of course not be determined in that proceeding. As to the work stoppage, however, the contention requires more thorough exploration. For if it were true that the determination of whether the strike violated the agreement turned on essentially the same criteria as we would apply in determining whether our Act had been violated by the self-same strike, then, as in *Collyer,* there would be good reason for us to step aside and let the parties' own procedures resolve their dispute.

In many cases of the type here involved such deferral might well be appropriate, for many collective agreements define the bargaining unit essentially in the wording of a Board certification and thus often excludes from coverage by the agreement "supervisors as defined by the National Labor Relations Act, as amended." Under such an agreement the issue under the grievance and arbitration provisions would be whether the strike was to compel the payment of benefits required by the agreement to an employee covered by the agreement or, on the other hand, to an excluded "supervisor." If the former, the strike would not violate the agreement if, as here, there is a specific provision in the agreement permitting a strike

under such circumstances. But if the latter, the no-strike provisions of the agreement would apply, since the strike would not be to compel payments on behalf of an "employee." Thus, an arbitrator—or the parties themselves in the grievance discussions—would of necessity be considering the same legal issue—i.e., whether Ziltener was an "employee" or a "supervisor." We might well under such circumstances be willing to defer, retaining jurisdiction only against the contingency that the arbitrator's determination of this issue should be repugnant to the policies of our statute.

We have, however, examined the instant agreement and find that it contains no such exclusion from coverage of statutory "supervisors." In fact, the agreement contains no description of the unit of employees covered. We further note that, unlike many industrial agreements, this contract specifically covers foremen. Indeed, the Union here claims that Ziltener should have received payments of wages and benefits applicable to foremen generally. It would therefore not appear that an arbitrator, in determining whether or not Ziltener was working at a position intended to be covered by the agreement, would be considering the issue which we are called on to decide—i.e., Ziltener's status as an "employee" or "supervisor" as defined in the Act which we administer.

Furthermore, since we are in any event required to take jurisdiction in order to determine the issue of whether the fine was violative of our Act, there seems less reason to defer the other issue raised by the complaint; namely, the Union's conduct with respect to the strike. When an entire dispute can adequately be disposed of under the grievance and arbitration machinery, we are favorably inclined toward permitting the parties an opportunity to do so. One of our reasons for so doing is to avoid litigating the same issues in a multiplicity of forums. But here, since

we must perforce determine a part of the dispute, there is far less compelling reason for not permitting the entire dispute to be resolved in a single proceeding.

For these reasons we decline in this instance to defer to the grievance and arbitration provisions of the agreement and instead, having found both the fine and the work stoppage to have violated Section 8(b)(1)(B) of our Act, shall enter an appropriate order to remedy the said violation.

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) and 8(b) of the Act.

2. George Koch Sons, Inc., is an employer engaged in commerce within the meaning of the Act.

3. David Ziltener, when employed by George Koch Sons, Inc., the Charging Party, was at all material times a supervisor and "representative" of George Koch Sons, Inc., within the meaning of Section 8(b)(1)(B) of the Act.

4. By restraining and coercing the Charging Party in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Sheet Metal Workers' International Association, Local Union No. 17, AFL-CIO, shall:

1. Cease and desist from:

(a) Restraining or coercing, or attempting to restrain or coerce, George Koch Sons, Inc., in the selection

or retention of its representatives for the purposes of collective bargaining or the adjustment of grievances by trying and finding or otherwise disciplining Erection Supervisor David Ziltener or any other supervisor of the Employer.

(b) In any other manner restraining or coercing George Koch Sons, Inc., in the selection and retention of its representatives for the purposes of collective bargaining and the adjustment of grievances.

(c) Making further demands on George Koch Sons, Inc., for payments of the sums for back wages and pension fund contributions for David Ziltener.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

(a) Repay to David Ziltener the sum of $1,500, the amount assessed against him as a fine, together with 6 percent interest from the date of his payment of the fine.

(b) Rescind said fine and completely exscind all record thereof, and notify David Ziltener in writing that such action has been taken.

(c) Reimburse George Koch Sons, Inc., for all moneys paid by it for back wages and health and welfare and pension fund contributions for David Ziltener and for all moneys extracted from George Koch Sons, Inc., as payment of wages to sheetmetal workers on strike on July 31 and August 1, 1970, for services not performed together with 6 percent interest from the date of payment by Koch.

(d) Notify, in writing, any banks or banking institutions holding any of the checks issued to David Ziltener or to the health and welfare and pension funds that it will not insist on or demand payment.

(e) Post at its office and meeting places in Boston copies of the attached notice marked "Appendix."[4]

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading

Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Forward signed copies of said notice to the Regional Director for posting by George Koch Sons, Inc., it being willing, at all locations where notices to employees are customarily posted.

(g) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C.
September 20, 1972

"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO ALL MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT restrain and coerce George Koch Sons, Inc., in the selection and retention of its representatives, including David Ziltener, for purposes of collective bargaining and adjustment of grievances.

WE WILL NOT prefer changes against, try, find, or similarly discipline David Ziltener, or any other supervisor of George Koch Sons, Inc., as a member of this labor organization, in regard to matters concerning their employment while such member is the selected representative of George Koch Sons, Inc., for the purposes of collective bargaining or the adjustment of grievances.

WE WILL NOT make further demands on George Koch Sons, Inc. for payments of the sums for back wages and health and welfare and pension fund contributions for David Ziltener.

WE WILL rescind the $1,500 fine imposed on David Ziltener, together with 6 percent interest per annum, and WE WILL exscind all reference thereof from our records, and will advise David Ziltener that we have taken the aforesaid action.

WE WILL reimburse George Koch Sons, Inc., for all sums of money paid by it for back wages and health and welfare and pension fund contributions for David Ziltener and for all sums of money extracted from George Koch Sons, Inc., as payment of wages to sheetmetal workers who were on strike on July 31 and August 1, 1970, for services not performed, together with interest thereon at the rate of 6 percent interest per annum.

WE WILL notify, in writing, any bank or banking institutions currently holding any checks issued to David Ziltener for back wages or to the health and welfare and pension funds that we will not insist on or demand payment.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION No. 17, AFL-CIO
(Labor Organization)

Dated..... By.....
(Representative) *(Title)*

ORDER CORRECTING DECISION AND ORDER

On September 20, 1972, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding in which there is an inadvertent omission.

IT IS HEREBY ORDERED that said Decision and Order be, and it hereby is, corrected by adding the words "its officers, agents and representatives" before the word "shall:" in the first paragraph of the Order on page 10.

IT IS FURTHER ORDERED that the Decision and Order, so printed, shall appear as hereby corrected.

Dated, Washington, D. C., January 10, 1973.

By direction of the Board:

GEORGE A. LEET
Associate Executive Secretary

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[1] 199 NLRB No. 26.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Seventh Floor, Bulfinch Building, 15 New Chardon Street, Boston, Massachusetts 02114, Telephone 617 - 223-3300.

TXD-75-72
Framingham, Mass.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 1-CB-1719

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 17, AFL-CIO

AND

GEORGE KOCH SONS, INC.

Norman Zankel, Esq., of
Boston, Mass., for the
General Counsel.
Robert M. Segal, Esq., of
Boston, Mass., for the
Respondent.[1]
Paul J. Kingston, Esq., of
Morgan, Brown, Kearns & Joy, Esqs.,
of Boston, Mass., for the Charging Party.

TRIAL EXAMINER'S DECISION
STATEMENT OF THE CASE

This case was brought before the Board upon:

1. A charge by George Koch Sons, Inc., herein Koch, against Sheet Metal Workers' International Association, Local Union No. 17, AFL-CIO herein Local 17, alleging Local 17 violated Section 8(b)(1)(B), filed December 4, 1970.

2. A complaint, an amended complaint and an amendment to the complaint issued by the General Counsel against

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[1] Robert M. Segal was substituted for Arthur J. Flamm as attorney for Respondent during the hearing.

Local 17 alleging violation of Section 8(b)(1)(B), said complaints being dated February 24, June 24 and July 17, 1971.

3. A hearing held before me at Boston, Massachusetts, on September 9 and November 30, 1971.

4. Briefs submitted by the parties on January 3, 1971.

[2] Upon the entire record in this case and from my observation of the witnesses while testifying, I make the following:

FINDINGS AND CONCLUSIONS

I. *The Business of Koch*

Koch is an Indiana corporation having its principal place of business at Evansville, Indiana, where it is engaged in the manufacture and installation of organic paint processing equipment and related products. In the course of its business Koch purchases large quantities of equipment which are transported in interstate commerce through various states of the United States and sells and transports substantial quantities of its manufactured equipment in interstate commerce to states of the United States other than Indiana.

At all times material herein Koch has been employed as a contractor by General Motors Corporation at its Framingham, Massachusetts, plant and receives goods and materials valued in excess of $50,000 annually at said plant from places outside the State of Massachusetts.

Koch is engaged in commerce within the meaning of the Act.

II. *The Labor Organization Involved*

Local 17 is a labor organization within the meaning of the Act.

III. *The Unfair Labor Practices*

A. *The Chronology of Events*

In November, 1969, Koch was working on the installation of a new plant facility for General Motors at its Framingham, Massachusetts, plant. The job was a large one and at one time Koch employed about 90 sheetmetal workers on the job. George Thompson was the general superintendent for Koch at the jobsite. Terry Dishman was manager of the service and installation department of Koch, working out of its Evansville, Indiana, office.

The sheet metal work at this job was performed pursuant to a local area contract between Local 17 and the Roofing and Sheet Metal Contractors Association of the Building Trades Employees Association.[2] Koch was allowed two employees who were not members of Local 17,[3] but all other sheet metal workers were employed through Local 17 and worked under the terms and conditions of the contract.

[3] On November 11, 1969, and after prior discussion with him, Koch wrote Dave Ziltener, a sheet metal worker previously employed by Koch and who resided at Janesville, Wisconsin, the following letter:

November 11, 1969
(Our 96th Year)

Mr. Dave Ziltener
1845 Garden Drive
Janesville, Wisconsin 53545

Dear Dave:

The following is a confirmation of our conversation and agreement on employing you as an erection supervisor for our oven job at GMAD-Framingham, Massachusetts, Job #909-4:

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[2] Respondent's Exhibit No. 1.
[3] *Id.* Article VIII, Section 6.

Weekly salary would be $285.00 per week including any and all overtime.

Airplane travel to job at start and return to Janesville at end of job.

No transportation or travel expense at job-site is to be furnished.

Living expenses of $20.00 per day for duration of job is included.

Your immediate superior during the job will be Mr. George Thompson, General Job Superintendent.

The above is only for this particular job at Framingham, Massachusetts. If after completion of this job, it is mutually agreed to retain you in our employment, all the above conditions will then be reviewed.

We would like for you to report to Framingham the morning of November 17, 1969.

Any further arrangements can be made with Mr. Thompson, c/o Winthrop Apts., Apt. #6, 135 Winthrop Street, Framingham, Massachusetts. Home phone—area 617-875-6884 or office phone—area 617-879-5028.

Very truly yours,

GEORGE KOCH SONS, INC.

[4] Ziltener testified that he reported to the jobsite on November 17 and worked pursuant to the terms of the letter as erection superintendent until July 6, 1970. He told the representatives of Local 17 that he was receiving "about $600 a week," which satisfied them that he was receiving at least the union scale for the area. (Journeymen were averaging, according to union representatives, from $450 to $500 per week.) [4]

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[4] Article VIII, Section 5 of the contract provided:

Except as provided in Section 2 and 5 of this Article, the Employer agrees that journeymen sheet metal workers hired outside of the territorial jurisdiction of this Agreement shall receive the wage scale and working conditions of the local agreement covering the territory in which such work is performed or supervised.

Ziltener testified that on July 6 he was notified by Thompson that his services were no longer needed by Koch.[5] On either the next or the second day after this notice Ziltener went to John Dowd, the union steward, and told him Koch had not been making the required health and welfare payments to his local (in Wisconsin) as required by Local 17. At the intervention of Local 17 Ziltener was retained on Koch's payroll until July 30. During this period Ziltener had discussions with Laurence McLaughlin, president of Local 17 and employed at the jobsite, and with George Riley, one of Local 17's business agents, concerning his wage rates, health and welfare payments and pension payments during his employment at Framingham.[6] Riley approached Thompson about this problem and he told Riley it was out of his hands since Ziltener's payroll audit was controlled by the Evansville office.

[5] On July 30 Terry Dishman was at the jobsite and was told by Riley that if the matter of the payments due Ziltener was not straightened out he (Riley) was pulling the

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Addendum 16 of the contract reads:

Foremen Shall receive amounts above the going rates as set forth below:

Crew of four (4) to (7) inclusive; twenty-five cents per hour.

Crew of eight (8) to twelve (12) inclusive; forty cents per hour.

Crew of thirteen (13) to twenty (20) inclusive; fifty cents per hour.

[5] Neither Ziltener nor Thompson testified as to the reasons for his discharge. There is testimony that Ziltener told a union representative it was for absenteeism over the preceding weekend. Ziltener was not only an evasive but an unwilling witness. He did not appear at the first hearing on September 9 and the hearing was recessed until November 30 to permit the General Counsel to compel his appearance by subpoena.

[6] Ziltener admitted to them that he had been receiving only $285 per week and told them no payments had been made for health and welfare or pension to his Wisconsin local.

men. The sheetmetal workers did not work on either Friday, July 31, or Saturday, August 1. On Friday morning Dishman called Riley and he and Thompson went to the union hall where they met with Riley, Dowd and another business agent named Keough. The question of the amount owed Ziltener was discussed and, after Dishman and Thompson left the room, the union representatives computed the monies due Ziltener as $9,442.42 for backpay, $601.61 for health and welfare and $505.00 for pension. Koch agreed to make the payments in exchange for general releases from Local 17. Local 17 demanded, in addition, that the sheetmetal workers who were on strike that day and would be on strike Saturday be paid for the time lost if they were to work on Monday. Koch agreed to this and checks to the individual sheetmetal workers in the total amount of $13,119.92 were issued. These checks were cashed but Dishman testified that when Local 17 refused to issue general releases payment was stopped on the checks to Ziltener and to the health and welfare and pension funds and they had not been paid at the time of the hearing.

The impasse was apparently maintained until November 2, 1970, when according to Dishman, he received a telephone call from Riley in which Riley told him the men would not return to work (the men had been out again because General Motors had been struck by the U.A.W.) unless the checks were paid. Dishman stated the men returned to work on November 9 after a series of telegrams from Dishman to the Sheet Metal Workers' International. (These were not offered in evidence).

Meanwhile, on August 17, Local 17 wrote Ziltener notifying him that charges had been preferred against him and enclosing a copy of the charges (Respondent's Exhibit No. 10). Specifically he was charged with:

1. Working for less than the Boston wages in the Boston area.
2. Being paid for forty hours and working various hours over forty.
3. Having no Health & Welfare or Pension paid on hours worked.
4. Contracting to do work on a basis other than that provided in contract.

On September 8 Ziltener was notified that his trial would be held on September 24 at Local 17 offices in Boston, Massachusetts. (Respondent's Exhibit No. 11.) On November 16 Ziltener was sent a copy of the minutes of the hearing and notified that he had been fined $500 on each of the first three specifications. (Respondent's Exhibit No. 12.)

Dishman testified that on November 25 Riley again called him and told him that unless new checks were written for Ziltener and the health and welfare payments the job would be "pulled." The sheet metal workers did not work December 4 but returned after Dishman sent telegrams to the International and Local 17. On December 4 Local 17 forwarded to Local 416, in Janesville, Wisconsin, the checks made by Koch to the Health and Welfare Fund and to the Pension Fund, for collection by that local and also notified Local 416 that Ziltener had paid the fine of $1,500. This concludes the facts with respect to the fine levied against Ziltener.

[6] On December 4 Koch submitted to the Local Joint Adjustment Board of Local 17 and the Roofing and Sheet Metal Contractors Association of the Building Trades Employees Association its dispute with Local 17 respecting the payments allegedly due Ziltener and the Health and Welfare and Pension Funds. (Respondent's Exhibit No. 2) This letter is attached hereto as "Appendix A."

On December 7 Local 17 filed a complaint with the Joint Board alleging Koch with violations of the contract between Local 17 and the Association and asking for a hearing. (Respondent's Exhibit No. 3.)

On January 4, 1971 the Joint Board held a hearing and Koch submitted a three page statement of its position with respect to the dispute. (Respondent's Exhibit No. 4.) The minutes of this meeting were received in evidence (Respondent's Exhibit No. 5.) The meeting was continued by the Board on January 12 and the minutes (Respondent's Exhibit No. 6) contain the decision, which was as follows:

> . . . the Board ruled unanimously that one David Ziltener came into Sheet Metal Workers' Local Union #17 area under the provisions of the 2 man rule as a sheet metal worker and that David Ziltener is entitled to the sheet metal workers' wages in their entirety for all hours worked under the existing Sheet Metal Workers' Local Union Agreement.

On February 1, 1971, Koch took an appeal from the Joint Board by making "Application for Services of a Panel and Hearing under Article X, Section 3, of the Standard Form of Union agreement. (Respondent's Exhibit No. 8.) In its appeal Koch took the same position as that set forth in its "Statement of Position" before the Joint Board. On April 26 a panel was appointed and a hearing noticed for May 20. (Respondent's Exhibit No. 9.) At the time of the conclusion of the hearing in this case, November 30, 1971, no decision had issued.

2. *The Issues*

On the basis of the foregoing facts the General Counsel issued the complaint, as amended, alleging Local 17 violated Section 8(b)(1)(B) of the Act by:

1. Filing charges against and fining David Ziltener

for working for less than Boston wages in the Boston area and having no Health & Welfare or Pension paid on hours worked.

2. By telling Koch it should make health and welfare and pension payments to Local 17 on behalf of Ziltener; by telling Koch it should pay Ziltener the difference between the wages paid Koch and the wages due Koch under the union contract.

[7] 3. By causing work stoppages at the Framingham jobsite on July 31 and August 1, 1970, from November 2 through November 7,[7] and again on December 4 to compel Koch to make the aforesaid payment.

3. *Conclusions*

As the Trial Examiner remarked at the hearing, there must be more to this case than meets the eye, but the decision must rest on what does meet the eye and not on the suspected motives of the parties.

I do not find it necessary to determine whether Ziltener was a supervisor within the meaning of the Act between November 17, 1969, and July 6, 1970, for no disciplinary action was taken against him during that period.[8] Local 17 did not take disciplinary action against Zilt-

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[7] These dates accord with the evidence taken at the hearing.

[8] I agree with the General Counsel that if it is shown that an employee possesses any of the indicia of supervisory authority set forth in Section 11 of the Act he becomes, *per se*, a representative "for the purposes of collective bargaining or the adjustment of grievances," within the meaning of Section 8(b)(1)(B) of the Act. See *Toledo Locals Nos. 15-P and 272, etc. (Toledo Blade Company)*, 175 NLRB 1072 enf'd 437 F.2d 55. Under *Toledo* the Employer was protected not only as to representatives who adjusted contractual grievances but as to those who handled or adjusted personal gripes or grievances regardless of their triviality. (In a prior hearing before the court in the same case, 76 LRRM 2796), the court lamented that its calendar was bogged down with "infinitesimally small abstract grievances.") Not only did the Board in *Toledo* give full scope of the term "grievance" but also included within the term "representative" not only supervisors who had handled grievances

ener until after his discharge by Koch on July 6. In fact it was Local 17 which kept him on Respondent's payroll for a period of approximately 3 weeks while it investigated his complaints against Koch. Having discovered from Ziltener that he had lied to its representatives concerning his wages and that he was in fact scabbing during the entire course of his employment with Koch, Local 17 then preferred the charges, giving Ziltener due notice and an opportunity to appear, and found him guilty.

[8] This case is distinguishable from all the cases cited by the General Counsel and Respondent in two vital factors. First, Ziltener was not a supervisor at the time he was fined nor was he even an employee. Second, Ziltener was not charged with any violation which related to his supervisory duties or responsibilities. He was fined for three specific violations of Local 17 rules relating to the terms of the contract Koch had agreed to abide by. The General Counsel is apparently contending that Ziltener had the right to scab and that Koch had the right to breach the contract it had agreed to observe simply by classifying Ziltener as an "erection supervisor." No easier way to evade the contract wage scale could be found. (Foreman, as well as journeymen, were covered by the contract wages.) Under these circumstances I do not find that Local 17's actions taken against Ziltener constituted restraint or coercion of the Respondent in the selection of its bargaining representatives. Ziltener was no longer such a representative and had no foreseeable prospect, in

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but supervisors who might be "natural and potential representatives of the Blade for the handling and settlement of grievances." Statutory construction could be stretched no further to protect the employer's rights. In view of the fact that all journeymen craft workers sent to a construction site are eligible for selection as foreman and many shift from journeymen to foremen and back again it would appear that every craftsman was a member of a pool of potential representatives for the handling of grievances. The General Counsel has not, however, advanced the argument that any fine of any union member would constitute a violation of Section 8(b)(1)(B) so I find it unnecessary to reach that issue.

view of his discharge, from becoming such a representative in the future. More important, however, is the fact that the action taken by Local 17 was not directed against Ziltener for any conduct in his capacity as supervisor or representative of Respondent. It was directed solely to his acceptance of working conditions lower than those provided in the area bargaining agreement. I hardly think that Section 8(b)(1)(B) was intending to protect scabbing or to protect any employer who violates his own agreement.

I find even less merit, if possible, in the argument of the General Counsel and Koch that the work stoppages violated Section 8(b)(1)(B). These stoppages occurred not to coerce Koch in the selection of his representative nor to protest the action of any supervisor acting in that capacity but to protest Koch's failure to abide by the terms of its agreement with Local 17 and to redress Ziltener for the losses sustained by reason of such breach. I am somewhat at a loss to understand the purpose of the General Counsel, advanced with unusual zeal,[9] designed, it seems, to protect Koch from the consequences of its own bad faith.[10]

[9] It is recommended that the complaint be dismissed in its entirety.

Dated at Washington, D.C.
February 8, 1972.

(s) JOHN F. FUNKE
Trial Examiner

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[9] Among the remedies urged by the General Counsel is that reimbursement of Koch by Local 17 of the $13,119.92 paid to the striking sheet metal workers. Local 17 was not enriched by this sum and, if compelled to reimburse, would undoubtedly impose assessments on the strikers. I doubt that the policies of the Act require the General Counsel to act as a collection agency on behalf of an employer against employees.

[10] The Joint Board, which might be presumed to have more expertise in this specific area than the Labor Board and to which Koch submitted the dispute, found against Koch on the contract issue as set forth above.

COURT, U. S. No. 73-1101

MAR 8 1974

In the Supreme Court of the United States, JR., CLERK

OCTOBER TERM, 1973

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL NO. 17, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
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LINDA SHER,
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National Labor Relations Board,
Washington, D.C. 20570.

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Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519 29 U.S.C. 151, *et seq.*):
Section 8(b)(1)(B) 2, 6, 8
Section 10(a) 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1101

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL NO. 17, AFL-CIO, PETITIONER

v.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion. The Board's decision and order (Pet. App. B 25-35) are reported at 199 NLRB No. 26.

JURISDICTION

The decree of the court of appeals, adopting the Board's decision and enforcing its order, was entered on October 18, 1973 (Pet. App. A 24). The petition for a writ of certiorari was filed on January 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that erection supervisor Ziltener was a management representative whose employment conditions were not covered by the collective agreement, rather than a "working foreman," and that therefore the Union violated Section 8(b)(1)(B) of the National Labor Relations Act by striking to compel the company to pay Ziltener in accordance with the agreement and by fining him for working for less compensation than the union deemed proper.

2. Whether, in the circumstances of this case, the Board was reasonable in declining to defer to arbitration proceedings invoked by the parties.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 158, *et seq.*), are set forth at pp. 3-4 of the petition.

STATEMENT

A. The Board's Findings of Fact

In November 1969, George Koch Sons, Inc. (the Company), a contractor with home offices in Evansville, Indiana, was constructing an addition at a General Motors plant in Framingham, Massachusetts (Pet. App. B 26, 39). The Company employed a work force of 150, composed of at least four crafts—sheet metal workers, pipefitters, electricians, and ironworkers (Pet. App. B 26; A. 52-53, 62).[1] The work was performed by crews

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[1] "A." refers to the appendix to the briefs in the court below.

of 4 to 12 men, each led by a foreman who functioned as a "lead man" (A. 52, 63, 154, 168-169). Employment conditions of the sheet metal workers were governed by a local area agreement between petitioner Local No. 17 (the Union) and the Roofing and Sheet Metal Contractors Association, which covered "foremen" and provided that they were to be compensated according to the size of their crew (Pet. App. B 28, 41-42, n. 4; A. 370, No. 16).

On November 11, 1969, after negotiations with the Company's home office, David Ziltener, a member of Sheet Metal Local No. 416 in Janesville, Wisconsin, was hired as erection supervisor at the Framingham project (Pet. App. B 26-27, 40-41; A. 231-234, 356). A Company vice-president had previously interviewed Ziltener in Janesville and told him that he would be working as "a manager or a superintendent in a management department" and would "have to make up [his] mind what kind of salary [he] would have to have" (A. 233). Ziltener proposed $285 per week plus $20 per day living expenses, or a total of $425 per week, which the Company accepted (Pet. App. B 26-27, 41; A. 233-234, 258, 356).

George Thompson, a general projects supervisor for the Company, was in charge of the Framingham project (Pet. App. B 27, 41; A. 44-45). Ziltener was "second in command," and was in charge when Thompson was not on the jobsite (Pet. App. B 27; A. 47, 60, 311, 317, 327-328).

Ziltener and Thompson were the only men on the job who were paid directly from the Company's home office in Evansville (A. 213, 221-222). Ziltener attended meetings which Thompson held with the general foremen for the various crafts (Pet. App. B 27; A. 236-237, 277). Also, once or twice a month, management meetings

regarding the project were held with Vice President Kaufman, Installation and Service Manager Terry Dishman, and occasionally owner Bob Koch. Ziltener attended these meetings with Thompson, and participated actively in the discussions of personnel, job assignments, programming of the work, and how the work was to be done (Pet. App. B 27; A. 55-56).

Ziltener advised General Supervisor Thompson as to the suitability of employees for particular job assignments (A. 56), spoke to foremen about employees "taking too long coffee breaks" and otherwise "goofing off" (A. 243), and had authority to grant time off and to adjust grievances (A. 60, 63-64, 80). On one occasion, at Ziltener's recommendation and after discussions with Union representatives in which Ziltener participated, the general foreman for sheet metal work was discharged (Pet. App. B 27; A. 59, 242-244). Ziltener was also responsible for negotiating and settling a jurisdictional dispute which arose on the jobsite at a time when Thompson was in Indiana (A. 311-312).

On July 6, 1970, the Company discharged Ziltener (Pet. App. B 28; A. 246-247). He went to Union representatives and complained that the Company had failed to pay his pension and welfare contributions, as he claimed it had agreed orally to do (A. 248-249, 261). While considering Ziltener's grievance, the Union learned that his pay as erection supervisor had been less than the Union contract provision for foremen's wages (A. 176).

The Union demanded that the Company pay Ziltener the difference between what he had received and what a foreman would have received under the contract (A. 87-90, 176-179). When the Company failed to pay Ziltener the back wages and other benefits which the Union claimed were owed him, the Union called a strike of the

Company's sheet metal workers to compel such payment (A. 176-178). To stop the strike, the Company gave the Union checks for Ziltener's claimed backpay and benefits, and also paid the employees for the two days they were on strike (A. 89-91).

On August 17, Union Business Representative Riley filed charges with the Union against Ziltener, alleging that, in contravention of Article 17 of the Union's Constitution, he had violated "the established union collective bargaining agreements * * * relating to rates of pay, rules and working conditions"—by working in Boston for less than Boston wages, working over 40 hours when paid only for 40, and having no health, welfare and pension contributions paid on hours worked (Pet. App. B 29; A. 391). Ziltener was found guilty of the charges and fined $1,500, which he subsequently paid (Pet. App. B 29; A. 169-170).

The Company filed an unfair labor practice charge with the Labor Board. It also filed with the Local Joint Adjustment Board, established under the contract between the Union and the Roofing and Sheet Metal Contractors Association, a grievance alleging that the Union's strike violated the no-strike clause of the contract because Ziltener was a supervisor and not covered by the contract (Pet. App. B 29; A. 373-374). The Union countered with a grievance charging that the Company had violated the contract (Pet. App. B 29; A. 375). On January 1, 1971, the Local Board ruled that Ziltener had come into the Union's jurisdiction as a sheet metal worker and therefore was entitled to sheet metal worker's wages for all hours worked (Pet. App. B 29; A. 383-384). Minutes of the Local Board indicate that this finding was based upon the testimony of Union Steward Dowd that Ziltener "worked * * * with the tools and * * * took orders from * * *

the job foreman" (A. 382). The Company appealed this determination, but as of the time of the Labor Board hearing there had been no decision on the appeal (Pet. App. B 29; A. 386-389).

B. The Decisions Below

The Board rejected the Union's contention that Ziltener was an employee whose working conditions were covered by the collective bargaining contract under the provisions relating to "foremen" (Pet. App. B 27, 32). The Board found that Ziltener was not a foreman covered by the contract, but rather a supervisor who was "the Employer's representative 'for the purpose of collective bargaining or the adjustment of grievances' within the meaning of Section 8(b)(1)(B)" of the Act (Pet. App. B 28). Accordingly, the Board concluded that the Union's action in striking and in disciplining Ziltener was an effort to dictate to the Company the terms under which it could hire a management representative, and thus violated Section 8(b)(1)(B) of the Act (Pet. App. B 30).

The Board also rejected the Union's contention that it should have deferred decision pending resolution of the Local Joint Adjustment Board proceedings. The Board, finding that the collective agreement contained no "exclusion from coverage of statutory 'supervisors'," concluded that it was unlikely that "an arbitrator, in determining whether or not Ziltener was working at a position intended to be covered by the agreement, would be considering the issue which we are called on to decide—*i.e.*, Ziltener's status as an 'employee' or 'supervisor' as defined in the Act * * * " (Pet. App. B 32). The Board added (Pet. App. B 32-33):

> * * * [S]ince we are in any event required to take jurisdiction in order to determine the issue of whether the fine was violative of our Act, there

> seems less reason to defer the other issue raised by the complaint; namely, the Union's conduct with respect to the strike. When an entire dispute can adequately be disposed of under the grievance and arbitration machinery, we are favorably inclined toward permitting the parties an opportunity to do so. One of our reasons for so doing is to avoid litigating the same issues in a multiplicity of forums. But here, since we must perforce determine a part of the dispute, there is far less compelling reason for not permitting the entire dispute to be resolved in a single proceeding.

The Board ordered the Union, *inter alia*, to rescind Ziltener's fine and to reimburse the Company for the back wages and strikers' pay which had been obtained from it (Pet. App. B 34).

The court of appeals upheld the Board's decision and enforced its order (Pet. App. A 24).

ARGUMENT

1. The basic issue presented by the petition—whether, when an employer voluntarily agrees to have the wages and working conditions of certain supervisory personnel determined by the collective bargaining agreement, the union is free to strike to enforce such contractual provisions and to fine non-conforming supervisors—is not presented on this record. For the Board found that Ziltener was not a "foreman" covered by the bargaining contract and that the Company had not contemplated or intended that his working conditions be subject to bargaining. It therefore rejected the Union's contention (Pet. 4) that it was merely attempting "to enforce its collective bargaining contract" and concluded, instead, that the Union was attempting to coerce the Company into agreeing to the Union's terms concerning the working condi-

tions of a management representative. To strike an employer for selecting a supervisor under employment conditions which the union disfavors tends to restrain the employer in his choice of a representative, in violation of Section 8(b)(1)(B) of the Act. See *International Typographical Union Local 38* v. *National Labor Relations Board,* 278 F. 2d 6, 12 (C.A. 1), affirmed by an equally divided Court, 365 U.S. 705. Similarly, to fine one who agrees to serve as the employer's representative under conditions disfavored by the union likewise "must necessarily have an inhibiting effect—and indeed a coercive effect—on the employer in his future selection of representatives" (Pet. App. B 30).[2]

Thus, the only issue actually presented here is whether substantial evidence supports the Board's finding that Ziltener was not a working foreman covered by the collective agreement, as petitioner contends (Pet. 5), but rather was the "second in command" to General Superintendent Thompson (Pet. App. B 27). Such an evidentiary issue does not warrant further review. In any event, as shown in the Statement (*supra,* pp. 3-4), the Board's finding is amply supported by the record.

2. There is no merit to petitioner's contention (Pet. 20-22) that the Board should have deferred to the decision of the Local Joint Adjustment Board. Section 10(a) of the Act provides that the Board is "empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce" and that "[t]his power shall not be affected by any other means of ad-

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[2] *Illinois Bell* and *Florida Power* (Pet. 17, n. 23), Nos. 73-795, and 73-556, petitions for certiorari granted January 21, 1974, involve an entirely different question—*i.e.,* whether it is a violation of Section 8(b)(1)(B) for a union to discipline a supervisor for performing rank-and-file work during a strike.

justment or prevention that has been or may be established by agreement, law, or otherwise * * *." 29 U.S.C. 160(a). It is clear that "the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts." *National Labor Relations Board* v. *Strong Roofing & Insulating Co.*, 393 U.S. 357, 360-361, citing *Smith* v. *Evening News Association*, 371 U.S. 195, 197-198. It is equally clear that a Board decision takes precedence over a contrary arbitral award. *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 272.

The Board, of course, has discretion to defer to the arbitral process and has long done so where the parties have submitted the dispute to a fair arbitration proceeding and have obtained an award which is not repugnant to the policies of the Act. See, *e.g.*, *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082. Cf. *Collyer Insulated Wire*, 192 NLRB 837. The Board did not abuse its discretion in declining to do so here, since the arbitration proceeding did not determine all of the issues involved in the unfair labor practice proceeding (*supra*, p. 7).

3. The final issue raised in the petition—whether the Board properly ordered the Union to recompense the Company for the strikers' wages—is not properly before this Court since petitioner failed to raise it in the court of appeals. See *Duignan* v. *United States*, 274 U.S. 195, 200; *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16. In any event, such a remedy was a proper exercise of the Board's broad remedial authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1974.

DOJ-1974-03